In the Supreme Court of the United States

OCTOBER TERM, 1932.

KEYSTONE DRILLER COMPANY,
Petitioner,
vs.
GENERAL EXCAVATOR COMPANY,
Respondent.
No.

KEYSTONE DRILLER COMPANY,
Petitioner,
vs.
GENERAL EXCAVATOR COMPANY,
Respondent.
No.

KEYSTONE DRILLER COMPANY,
Petitioner,
vs.
THE OSGOOD COMPANY,
Respondent.
No.

KEYSTONE DRILLER COMPANY,
Petitioner,
vs.
THE OSGOOD COMPANY,
Respondent.
No.

PETITION FOR WRITS OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit,
and
BRIEF IN SUPPORT THEREOF.

FRANK O. RICHEY,
WILLIAM H. BOYD,
H. F. MCNENNY,
Counsel for Petitioner.

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TO THE UNITED STATES CIRCUIT OF APPEALS
FOR THE SIXTH CIRCUIT.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Keystone Driller Company, prays that Writs of Certiorari issue to review the decrees of the Circuit Court of Appeals for the Sixth Circuit entered in

the above entitled causes on December 6, 1932 (R. Vol. V, pp. 117, 118) (Rehearing denied February 9, 1933, R. Vol. V, p. 157), reversing the decrees of the District Court for the Northern District of Ohio, Western Division, (R. Vol. II, pp. 1107 and 1137) and directing that the Bills of Complaint (R. Vol. I, pp. 3 and 96) be dismissed without prejudice.

A.

SUMMARY STATEMENT OF MATTER INVOLVED.

These cases arose from two equity suits for patent infringement filed by Petitioner against Respondents and involve the application of the equitable maxim of "unclean hands." The suit against the Respondent, The Osgood Company, is based on four separate patents, infringement of each of which is charged by the Bill of Complaint (R. Vol. I, p. 96) and Supplemental Bill of Complaint (R. Vol. I, p. 139); and the suit against the Respondent, General Excavator Company, is based on the same four patents and an additional patent, set up in the Bill of Complaint (R. Vol. I, p. 3) and Supplemental Bill of Complaint. (R. Vol. I, p. 44.) An injunction and an accounting for past infringement is sought as to each patent in each suit. (R. Vol. I; pp. 9, 48, 102 and 143.) The District Court held four of the patents valid and three of these infringed, and held one patent invalid.

The Court of Appeals found that plaintiff had come into Court with "unclean hands" in regard to one only of the patents involved in each suit (R. Vol. V, p. 119) and on that ground alone directed that the Bills of Complaint be dismissed as to all of the patents in suit. (R. Vol. V, p. 124.) The question presented by this petition is:

> "Where a plurality of equitable causes of action are joined in one suit, as permitted by General Equity Rule 26, and where one of such causes is sullied so as to justify dismissal from an equity court under the 'un-

clean hands' maxim, should all of the other and unsullied causes of action likewise be dismissed along with it?"

The Court of Appeals of the Sixth Circuit in the instant cases said (R. Vol. V, p. 158):

> "Prior to the adoption of the new equity rules, the question (which we now present to this Court) could never have arisen for a bill covering multiple causes of action would have been bad for duplicity."

Notwithstanding the Court below found that Petitioner had come into Court with "unclean hands" with respect to one of the patents only, and therefore that one only of the causes joined under Rule 26 was sullied, the Court held that the doors of the equity court were closed against Petitioner, not only as to the sullied cause of action, but as to all of the other causes of action presented therewith. (R. Vol. V, p. 158.)

Thereupon the Court of Appeals reversed the decrees of the District Court and ordered that the cases be remanded with instructions to dismiss the Bills of Complaint without prejudice. (R. Vol. V, p. 124.)

B.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRITS.

I.

The ruling of the Court below is in conflict with the ruling of the Second Circuit Court of Appeals on the same question in *Maatschappij vs. Kosloff*, 45 Fed. (2) 94; and also conflicts with the ruling of the Ninth Circuit Court of Appeals in *Williams vs. Levy*, 54 Fed. (2) 18, affirming *In Re Myerfield*, 46 Fed. (2) 665.

II.

The ruling of the Court below defeats the plain purpose and intent of General Equity Rule 26 of this Court and

tends to multiply and increase the expense and burden of litigation.

III.

The Court below, in construing General Equity Rule 26 as requiring the dismissal of all causes of action joined thereunder in one suit upon a finding that the plaintiff's hands are unclean in regard to one only of the causes of action, has decided an important question of Federal law which has not been, but should be, decided by this Court; and has decided the same in a manner that is probably untenable and in conflict with the weight of authority.

Wherefore, your Petitioner respectfully prays that Writs of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding that Court to certify and to send to this Court for its review and determination a full and complete transcript of the record and all proceedings in the cases numbered and entitled on its docket No. 6065, General Excavator Company vs. Keystone Driller Company; No. 6066, Keystone Driller Company vs. General Excavator Company; No. 6067, The Osgood Company vs. Keystone Driller Company; No. 6068, Keystone Driller Company vs. The Osgood Company, and that the said decrees of the Circuit Court of Appeals for the Sixth Circuit may be reversed by this Honorable Court and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Keystone Driller Company,

By Frank O. Richey,
William H. Boyd,
H. F. McNenny,
Counsel for Petitioner.

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BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

I.

The Opinions of the Courts Below: The opinion in the Sixth Circuit Court of Appeals is reported at 62 Fed. (2) 48 and appears at page 119, Vol. V of the Record. The

opinion of the Sixth Circuit Court of Appeals denying rehearing appears in the Record, Vol. V, at page 157. The opinion of the District Court in the instant cases has not been reported and appears in the Record at pages 1067 to 1100, Vol. II.

II.

Jurisdiction: 1. The jurisdiction of this Honorable Court is invoked under Section 240a of the Judicial Code as amended by the Act of February 13, 1925; 28 U. S. Code, Section 347.

2. The date of the decrees to be reviewed is December 6, 1932. (R. Vol. V, pp. 117 and 118.) The petition for rehearing was filed Jan. 5, 1933 and was denied by the Court of Appeals February 9, 1933. (R. Vol. V, p. 157.)

3. These suits are equity suits arising under the patent laws of the United States. (R. Vol. I, pp. 3 and 96.) The decree of the Circuit Court of Appeals for the Sixth Circuit in each of the four appeals decided there requires that the Bills of Complaint in the two suits be dismissed without prejudice to the prosecution of suits at law; or actions in equity upon all the patents in suit except patent No. 1,511,114; or possibly to an action in equity upon all the patents. (R. Vol. V, p. 124.)

III.

Statement of the Case: Prior to the filing of the instant suits, three of the patents involved here were in suit against The Byers Machine Company in the United States District Court in Cleveland, Ohio, in which case these three patents were held valid by the District Court (R. Vol. I, pp. 10-13) and by the Sixth Circuit Court of Appeals. (44 Fed. (2) 283.)

After the decision of the District Court in the Byers case the instant suits were filed. Motions were made for

preliminary injunctions on each of the patents adjudicated in the Byers case, which were denied, but in lieu thereof, certain bonds were required.

Upon evidence presented by Respondents the District Court in the instant suits held in effect that Petitioner had suppressed or attempted to suppress during the Byers case the testimony of one witness regarding an alleged use urged as an anticipation of one patent in suit only—Downie patent, No. 1,511,114. The District Court in these cases, however, held that the "unclean hands" maxim did not apply to bar the relief sought in these suits. (R. Vol. II, pp. 1099 and 1100.)

The Court of Appeals of the Sixth Circuit, upon a hearing of appeals and cross-appeals in the instant cases held that Respondents had established the existence of a suppressive influence as affecting the Byers case and that by reason thereof Petitioner came into Court with unclean hands as to Downie patent, No. 1,511,114, and that these actions should be dismissed not only as to Downie patent, No. 1,511,114, but as to all the other patents and causes of action.

Neither the District Court nor the Court of Appeals in the instant cases found any wrongful conduct on the part of Petitioner relating to any of the patents in suit other than the Downie patent, No. 1,511,114. The finding of wrongful conduct by the District Court and the Court of Appeals in these cases related solely to an item of defense urged by Respondents against this one patent which was neither urged by the Respondents nor in any way material to any of the other patents in suit.

The Court of Appeals of the Sixth Circuit nevertheless reversed the District Court in each of the appeals and cross-appeals and directed that the Bills of Complaint be dismissed as to all of the patents without prejudice. (R. Vol. V, p. 124.)

IV.

ARGUMENT.

Summary of the Argument: A. The decision of the Court below is erroneous and is in conflict with the decisions of the Second Circuit Court of Appeals in *Maatschappij vs. Kosloff*, 45 Fed. (2) 94 and of the Ninth Circuit Court of Appeals in *Williams vs. Levy*, 54 Fed. (2) 18.

B. The construction by the Court below of General Equity Rule 26 is untenable and is a decision on an important question of Federal law which has not been, but should be, decided by this Court.

C. The decision of the Court below defeats the purpose of General Equity Rule 26 of this Court, and tends to multiply and increase the expense and burden of litigation.

A.

The ruling of the Court below that a finding that Petitioner has been guilty of conduct amounting to unclean hands in respect to one of the patents in suit but having no relation to any of the other patents in suit necessitates a dismissal of the suit as to all of these causes of action is directly contrary to the ruling by the Second Circuit Court of Appeals on precisely the same question of law.

In the case of *Maatschappij etc. vs. Kosloff*, 45 Fed. (2) 94, plaintiff sued to enjoin infringement of a trade-mark registered under the "Ten year clause" of the registration statute and also sued to enjoin the defendant from unfair competition. The defendant urged that the claim, asserted by the registration of the trade-mark, of a ten year use of the mark prior to 1905 was false, and that therefore the plaintiff was in Court with unclean hands. The Second Circuit Court of Appeals held (45 Fed. (2) 96):

"While, in view of the conclusion reached by us as to unfair competition, it may not be absolutely essential to determine the question of trade-mark, on the conflicting evidence before us, and in the light of that decision, we concur in the conclusions therein reached. Irrespective, however, of the validity of the trade-mark, we concur in the holding of the trial judge that, even if the claim, asserted by the registration, of a ten-year use of the mark prior to 1905, means such use in this country and if such claim were false, so that plaintiff would be unable to assert rights under the trade-mark, it would not thereby be prevented from obtaining relief against unfair competition in the sale of its goods; wrongdoing directly connected with the right sought to be vindicated may on the doctrine of 'unclean hands' deprive one of a remedy against piratical attacks on that property right; it does not outlaw the wrongdoer and leave him without protection in the vindication of other, though closely connected, rights. *Straus vs. Nataseme Co.*; 240 U. S. 179, 36 S. Ct. 288, 60 L. Ed. 590."

The Second Circuit Court of Appeals held that wrong doing directly connected with the rights sought to be vindicated, (the registered trade-mark) may deprive the plaintiff of a remedy in a court of equity on the doctrine of unclean hands, but that such wrong doing *did not deprive the plaintiff of its remedy in equity against unfair competition by the sale of the same articles charged to infringe the trade-mark*, and held that the plaintiff was entitled to an injunction restraining the unfair competition although the two causes of action were presented by the same Bill of Complaint.

In the instant case the Sixth Circuit Court of Appeals held (R. Vol. V, p. 158):

"The doctrine which we have applied is simply that if one, as actor, seeks to set the judicial machinery in a court of equity in motion upon grounds in respect

to which his conduct is sullied he will find the doors of the court closed against him"

and applied this bar not only to the one cause of action which the Court of Appeals held to be sullied, but to all other causes of action which were unsullied but which Petitioner sought to present at the same time.

The application of this rule stated by the Sixth Circuit Court of Appeals to the facts in the Second Circuit Case in the way in which the Court applied it in the instant case would necessarily have resulted in a holding that the plaintiff was not entitled to relief upon either the trade-mark, the unfair competition, or any other causes of action presented with these two if the plaintiff's conduct in respect to the trade-mark was wrong doing amounting to unclean hands.

Conversely the application of the rule stated by the Second Circuit Court of Appeals to the facts in the instant case would necessarily have resulted in a holding that even if Petitioner was barred by unclean hands on one cause of action, it was not barred on the other separate causes of action presented in the same suit.

The same conclusion was reached by the Courts in the Ninth Circuit in the cases of *In Re Myerfield,* 46 Fed. (2) 665, affirmed in *Williams vs. Levy,* 54 Fed. (2) 18, the ruling in those cases also being in conflict with the ruling of the Court below.

In the case of *In Re Myerfield* one Levy sought to prevent sale by a referee in bankruptcy of property held by the bankrupt, Myerfield. Levy offered in evidence a deed conveying the property to him, and also introduced evidence establishing a resulting trust as to the same identical property in his favor. The referee found the deed to be a forgery, and denied all relief to Levy, in spite of the proof of a resulting trust, on the ground that Levy had come into court with unclean hands by reason of his offer of

the forged deed, and was not entitled to invoke the equitable jurisdiction of the court either as to the deed or the resulting trust. The District Court reversed the order and found Levy was entitled to relief as to the resulting trust since the inequity applied only to the deed. The Court said, page 666:

> "Reprehensible though Levy's conduct may have been, I am constrained to hold that the referee erred in denying him all relief because he came into equity with unclean hands. The transaction by which the resulting trust was created was not tainted with fraud, illegality, or unconscionable conduct on his part. The deed in question was not part of the proof of the existence of the trust; it was material only on an issue of legal as distinguished from equitable title. The applicable principle is well stated in *Barnes vs. Barnes*, 282 Ill. 593, 118 N. E. 1004, 1005, 4 A. L. R. 4, where a plaintiff had fabricated evidence to support various items in an account, but had established her right generally to an accounting in equity; 'He who comes into a court of equity must come with clean hands, and one who does iniquity cannot have equity; but that maxim is limited in its application to where the substance of the thing is inequitable and the iniquity must apply to the particular subject-matter. It is not sufficient to bar relief that inequitable conduct should relate to the proof of some item or some fact, and where the origin of the claim is not inequitable, a fraudulent act in relation to it will not bar relief, *Goodwin vs. Hunt*, 3 Yerg (Tenn.) 124; 1 *Pomeroy's Eq. Jr.*, Section 399; *Chicago vs. Union Stockyards & Transit Co.*, 164 Ill. 224, 35 *L. R. A.* 281, 45 N. E. 430, 10 *R. C. L.* 140.' "

The decree in the District Court in that case was affirmed by the Ninth Circuit Court of Appeals in *Williams vs. Levy*, 54 Fed. (2) 18. That Court held in even more positive language that the finding of wrong doing in connection with one cause of action cannot affect another cause

of action presented therewith. The Court stated (page 19):

> "The referee seems to have been influenced by the fact, which he found upon conflicting evidence, that the deed which appellee produced, and which purported to convey the lot from the bankrupt to the appellee, was not genuine and that the bankrupt had not signed it. *But what possible difference could that fact make in the determination of the right of appellee to have the lot, which was by all the evidence admittedly* his, reserved to him?" (Italics ours throughout.)

The facts in the *Myerfield* case are on all fours with the facts in this case, and the ruling of the Court there, applied to the facts in this case would necessarily result in a holding that the Bills of Complaint should not be dismissed as to the causes of action unconnected with and unrelated to the alleged wrongful conduct, whatever might be the result as to the patent to which the conduct is said to relate.

Levy, the moving party, initiated proceedings in the equity court to protect his ownership of the property in question. Levy was not brought into court against his will, since he was free to relinquish his rights and allow the property to be sold. He was compelled to go into the equity court to protect his right in the same way that Petitioner was compelled to go into the equity court to seek an injunction against piratical attacks on Petitioner's patent rights and to prevent the destruction of the business Petitioner had built up upon those patent rights.

Under the recognized principles for applying the unclean hands maxim the Ninth Circuit Court of Appeals was clearly correct in granting the relief sought on the resulting trust theory, since this relief in no sense could be said to be "founded on the unlawful thing done or intended to be done." But the same is true of the relief sought by Petitioner on the causes of action arising from the infringe-

ment of the patents other than the Downie patent, No. 1,511,114. The preliminary injunction which was sought and denied on the other patents in suit in no sense could be said to be founded on the adjudication of the Downie patent, No. 1,511,114, but was founded only on the adjudication of those other patents in suit. The fourth and fifth patents in suit were added by supplemental bills after the application for preliminary injunction was denied.

Even if the reliance upon the previous adjudication in seeking a preliminary injunction on the Downie patent, No. 1,511,114, constituted unclean hands such as to bar the Petitioner from relief as to that patent in the instant suits, it is clear that Petitioner at no time in the instant suits has sought any relief on the other patents in suit based upon or in any way connected with the "unlawful thing done or intended to be done" whether that unlawful thing be considered to be the reliance upon the prior adjudication of the Downie patent, No. 1,511,114, as held by the Court below, or the previous conduct of plaintiff in regard to that patent, however the Court might construe that conduct in view of the hopelessly conflicting evidence.

B.

General Equity Rule 26* permits the joining in one suit of separate equitable causes of action, the expressed purpose being to "promote the convenient administration of justice." The rule is not intended to change any sub-

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* The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. But when there are more than one plaintiff, the causes of action joined must be joint, and if there be more than one defendant the liability must be one asserted against all of the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice. If it appears that any such causes of action cannot be conveniently disposed of together, the court may order separate trials.

stantive law or rule in equity, but merely to permit a combined trial of separate causes of action between the same parties which would not have been permissible prior to the rule.

Under the rule the universal practice has been to decide each cause of action on its own merits irrespective of the disposition of any other causes joined therewith, the only difference being that the causes are tried and considered together. In a suit on two patents, for example, the holding of one patent invalid does not affect the other which is in turn adjudicated upon its own merits. In *Leeds and Catlin vs. Victor Talking Machine Company*, 213 U. S. 301, 53 L. Ed. 805, this Court held that each invention claimed in a patent is a separate cause of action, and that the expiration of one claim by reason of the expiration of a foreign patent cannot affect the valjdity of another claim in the same patent to a different invention. Likewise where the court properly has jurisdiction of one cause of action, but not of another joined therewith, such other cause of action is dismissed and the case proceeds upon the one upon which the court has jurisdiction. *Geneva Furniture Mfg. Company vs. Karpen et al.*, 238 U. S. 254, 59 L. Ed. 1295.

The refusal of relief to a plaintiff on the ground of unclean hands is no different than the refusal of relief on the ground that the court has no jurisdiction. *Pope Mfg. Company vs. Gormully*, 144 U. S. 224; 36 L. Ed. 414, 419. Under the unclean hands maxim the equity courts do not punish or fine the plaintiff, but merely refuse to grant him relief in regard only to the particular matter concerning which his hand are unclean, (*Kinner v. Lake Shore & M. S. Ry. Co.*, 69 Ohio St. 339) and the case proceeds as to any other matters involved. *Pope Mfg. Company vs. Gormully & Jeffries Mfg. Company et al.*, 144 U. S. 238; 36 L. Ed. 420.

The Court below has held that causes of action joined under Equity Rule 26 and presented together in one bill are merged together to constitute a single "action" and that if the plaintiff's conduct is sullied in regard to any cause of action then presented, he will find the doors of the court closed against him "because he does not then appeal to the court as one in whose behalf the largely discretionary powers of the Court should be exercised." (R. Vol. V, p. 158.)

The Court said (R. Vol. V, p. 158):

> "Prior to the adoption of the new Equity Rules, the question could never have arisen for a bill covering multiple causes of action would have been bad for duplicity."

The Court below has thereby construed Equity Rule 26 as creating a merger of causes of action joined thereunder to such an extent that a defense, admittedly applicable to but one of the causes of action if they were presented separately, may justify dismissal of the Bill of Complaint as to all of the causes joined. This construction of Rule 26 constitutes a decision on an important question of Federal law which has not been, but should be decided by this Court. The rule does not state or imply that two or more causes of action joined in one suit shall become in effect one cause of action. And yet such a construction is implied by the decision of the Court below, since it is conceded that if the one patent found to be sullied had been omitted from the suit, or presented by a separate Bill, recovery on the others would not have been defeated. This Court has recently reviewed on Certiorari a conflict as to the construction of Equity Rule 30 in *General Electric Co. vs. Marvel Rare Metals Co.*, 77 L. Ed. 239, in which the petitioner contended for a similarly confining and nullifying construction of that Rule. It is submitted that the ruling in the instant cases should likewise be reviewed by this Court and the decisions reversed.

C.

Manifestly, such a construction of the rule tends to defeat the purpose of the rule. The inescapable conclusion from the Court's ruling is that plaintiff should have filed a separate Bill of Complaint on each of the patents in suit so as to avoid any possibility that a defense as to one of the patents only would defeat recovery on the other patents. This would multiply litigation, increase the expense to both the plaintiff and the defendant, and increase the burden of the litigation to the Courts and to the parties.

The propriety of this ruling presents a question of grave and immediate public importance. A plaintiff with two or more causes of action against one defendant which may be joined in one bill or presented separately will be constrained to accept the increased cost of instituting and carrying on two separate suits rather than joining the actions for the convenience of the Courts and all the parties if there is danger that a defense against one of the causes of action will be extended to and bar relief on the other solely because the two are presented by the same bill. The purpose of Rule 26, the promotion of the convenience of the Courts and parties by permitting joining of actions and reducing the number of suits will be nullified by such a precedent.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, and that to such end Writs of Certiorari should be granted and this Court should review and reverse the decision of the Circuit Court of Appeals for the Sixth Circuit.

FRANK O. RICHEY,
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